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NTSB Order No. EA-3946

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 22nd day of July, 1993

_____	)	
JOSEPH M. DEL BALZO,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-11589
v.	)	
	)	
FRED MOORE,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

Respondent has appealed from an initial decision of Chief Administrative Law Judge William E. Fowler, Jr., issued orally at the conclusion of an evidentiary hearing held on June 13, 1991.<sup>1</sup> By that decision, the law judge affirmed an order of the Administrator holding respondent in violation of sections 121.315(c) and 91.9 of the Federal Aviation Regulations ("FAR,"

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<sup>1</sup>An excerpt from the transcript containing the initial decision is attached.

14 C.F.R.),<sup>2</sup> in connection with an incident which occurred on April 10, 1989.<sup>3</sup>

In his order (which served as the complaint), the Administrator alleged the following:

1. You are the holder of Airline Transport Pilot [(ATP)] Certificate No. 246648041.
2. On April 10, 1989, you acted as pilot-in-command of a De[H]avilland Model DHC-8 aircraft, identification no. N927HA in the vicinity of Jacksonville, Florida.
3. Prior to departure, you were required to follow prescribed checklist procedures as outlined in the Henson Aviation, Inc.'s manuals for the DHC-8.<sup>[4]</sup>
4. Specifically, you were required but failed to check whether the [landing] gear alternate release door was properly stowed.

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<sup>2</sup>FAR § 121.315 reads as follows:

"§ 121.315 Cockpit check procedure.

(a) Each certificate holder shall provide an approved cockpit check procedure for each type of aircraft.

(b) The approved procedures must include each item necessary for flight crewmembers to check for safety before starting engines, taking off, or landing, and in engine and systems emergencies. The procedures must be designed so that a flight crewmember will not need to rely upon his memory for items to be checked.

(c) The approved procedures must be readily usable in the cockpit of each aircraft and the flight crew shall follow them when operating the aircraft."

FAR § 91.9, which has since been amended and recodified as § 91.13(a), provided:

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

<sup>3</sup>The Administrator has waived the imposition of a sanction for such alleged FAR violations, in accordance with the Aviation Safety Reporting Program.

<sup>4</sup>Respondent was a pilot for Henson Aviation at the time of the incident. The checklist in question is Henson's Originating Checklist for the DHC-8, a copy of which is Ex. A-3.

5. You then departed the [Jacksonville] airport and when airborne were unable to retract the landing gear resulting in your return to the airport.
6. As a result of your failure to follow the prescribed checklist procedures, you endangered the lives and property of others.

In affirming the Administrator's order, the law judge found that while respondent executed the Originating Checklist, he did so with insufficient care to detect that the alternate gear release door (AGRD) was not fully closed.<sup>5</sup> As a result, he determined that the FAR violations alleged by the Administrator were established.

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<sup>5</sup>In connection with that finding, the law judge opined that the Lindstam doctrine applies to this case. Under that doctrine, which was first enunciated by our predecessor agency, the Civil Aeronautics Board, in Administrator v. Lindstam, 41 CAB 841 (1964), it is not necessary for the Administrator to allege or prove specific acts of carelessness in order to support a finding of a violation of FAR § 91.9. Instead, the Administrator may, using circumstantial evidence, establish a prima facie case by creating a reasonable inference that the incident in question would not have occurred but for the respondent's carelessness. The burden then shifts to the respondent to come forward with an alternative explanation for the incident sufficient to overcome that inference. For a complete discussion of the Lindstam doctrine by the Board, see Administrator v. Davis and Manecke, 1 NTSB 1517, 1520-21 (1971). For reasons other than those propounded by respondent (see Respondent's Br. 20-21), we believe that the Lindstam doctrine is inapplicable here. Whereas that doctrine permits the use of circumstantial evidence to support a finding of a § 91.9 violation, the law judge in this case concluded from direct evidence relating to the operation of the AGRD and the impact of its positioning on landing gear movement that respondent had violated an operational FAR provision, namely § 121.315(c). The § 91.9 violation in question was thus residual or derivative in nature (see, e.g., Administrator v. Haney, NTSB Order EA-3832 at 4-5 (1993) (also involving alleged §§ 121.315(c) and 91.9 violations); Administrator v. Cory, NTSB Order EA-2767 at 6 (1988); Administrator v. Dutton, NTSB Order EA-3204 at 6-7 (1990); Administrator v. Thompson, NTSB Order EA-3247 at 5 n.7 (1991)) and no circumstantial inferences of carelessness were required to support a finding thereof.

Respondent has, in his appeal brief, asserted that he executed the checklist properly and that the Administrator failed to establish what further action he should have taken to assure that the AGRD was fully closed. He contends that while Henson's procedures required only a visual inspection of the AGRD, he also touched the door and pushed against it to confirm that it was closed, and maintains that an improperly seated T-handle situated behind the AGRD caused the door to be ajar, but not to such an extent that it was discoverable on visual and physical inspection.<sup>6</sup> Respondent further avers that other events of a similar nature (i.e., instances of gear retraction failure caused by AGRDs being ajar due to improperly seated T-handles) occurred on DHC-8 aircraft operated by Henson around the time of the incident in question, and suggests that this demonstrates the inadequacy of company checklist procedures, rather than any deficiency on his part in the execution of the checklist.<sup>7</sup>

The Board is, however, unpersuaded by respondent's arguments and will, therefore, deny his appeal.

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<sup>6</sup>The T-handle is part of the DHC-8 alternate gear release system, which facilitates emergency deployment of the main landing gear in the event of failure of the aircraft's primary hydraulic system. Tr. 96. When the AGRD is open, the primary hydraulic system is bypassed and an alternate hydraulic system is activated. Id. 97, 153. The T-handle, which is not coupled with either of the hydraulic systems, has the independent dual mechanical functions of opening the gear doors and deploying the landing gear. Id. 97, 153-54. Henson's procedures do not mandate any checklist action referable to the T-handle. Id. 76-77.

<sup>7</sup>The Administrator has submitted a reply brief, in which he urges the Board to affirm the initial decision.

In arriving at that determination, we have observed that the record is replete with evidence supportive of the law judge's finding that respondent failed to properly execute the checklist item in question.<sup>8</sup> To begin with, we note that while Henson's chief pilot confirmed at the hearing that company procedures require only a visual inspection of the AGRD,<sup>9</sup> he also testified that "[i]t should be fairly obvious" whether or not the door is open.<sup>10</sup> The testimony of respondent's copilot, in which he relates that a mechanic quickly discovered that the door was ajar after the aircraft returned to the airport,<sup>11</sup> tends to bolster such a view.

Moreover, although the evidence does not establish what caused the AGRD to be ajar, respondent's suggestion that an improperly seated T-handle prevented the door from closing fully will not, even if true, sustain his assertion that he was diligent in his execution of the checklist. In this regard, we note that Henson's chief pilot testified that the aircraft manufacturer, in response to an inquiry from Henson, indicated that "[t]he handle regardless of where it is [situated], will not hamper that door [from] closing sufficiently . . . . to keep

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<sup>8</sup>That checklist item reads as follows:  
 "LNDG GEAR ALT REL & EXT DOORS.....CLOSE"

<sup>9</sup>Tr. 53-54, 76.

<sup>10</sup>Id. 55.

<sup>11</sup>Id. 188.

. . . the landing gear from functioning."<sup>12</sup> Additionally, the chief pilot reported that Henson conducted independent tests which confirmed that the gear will function properly regardless of the position of the T-handle, and that the AGRD itself had to be pulled down "sufficiently for anyone to obviously see [that it was] not stowed properly" in order to prevent the gear from retracting.<sup>13</sup>

In view of such evidence, the Board believes that there is ample support for the law judge's finding that respondent committed the FAR violations alleged.<sup>14</sup> Thus, his initial decision will not be disturbed on appeal.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied; and
2. The law judge's initial decision is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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<sup>12</sup>Id. 65.

<sup>13</sup>Id. 65-67. We also note that the FAA air carrier inspector responsible for overseeing Henson's operations testified that the position of the T-handle does not affect the ability of the landing gear to retract. Id. 97-98.

<sup>14</sup>This is especially so in view of the fact that respondent is the holder of an ATP certificate and is, therefore, "held to the highest degree of care" in the operation of his aircraft. Administrator v. Ferguson and Bastiani, 3 NTSB 3068, 3070 (1980), affirmed 678 F.2d (9th Cir. 1982).

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.